KAM KWAI SUN (M.W.)

v.

WONG GIAM CHOY & ANOR.

HIGH COURT MALAYA, KUANTAN
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 192 OF 1976]
7 NOVEMBER 1983

TORT: *Negligence - Motor car accident - Liability - Whether defendants liable - Quantum - General and special damages - Interest - Relevant date.*

The plaintiff was a passenger in a car driven by the 2nd defendant when the car went off the road and overturned causing the plaintiff serious injuries. The plaintiff claimed that the 2nd defendant was negligent and failed to exercise reasonable care and skill while he was driving. The 1st defendant was the owner of the car. The plaintiff claimed that the 2nd defendant was the servant or agent of the 1st defendant, who had provided the car to transport guests attending a wedding. The plaintiff's action was filed on 20 July 1976. Later, however, the writ was amended to correct a mistake in the plaintiff's name and the amended writ was filed on 26 January 1981.

Held:

[1] The accident had occurred as a result of the negligent driving of the 2nd defendant.

[2] The 2nd defendant was neither a servant nor employee of the 1st defendant. In the circumstances no liability could be attached to the 1st defendant.

[3] As there was no evidence in support of damages for loss of earnings the only way to arrive at a just figure would be to award a lump sum for incapacity. In the circumstances, a lump sum of RM65,000 would be fair and reasonable.

[4] As none of the terms in the particulars of the special damages had been proved the amount claimed could not be considered at all.

[5] Interest at 6% should run from the date of the filing of the writ after it has been amended and not from the date the action was filed. The amendment was not necessitated by any fault of the defendant.

[Judgment for plaintiff against 2nd defendant.]

Case referred to:
Raja Mokhtar b. Raja Yaacob v. Public Trustee Malaysia [1970] 2 MLJ 151

For the plaintiff - Chang Ko Yow; M/s. Yeoh Kian Teik & Co.
For the defendants - Mahindar Singh; M/s. Mahindar & Co.

JUDGMENT

Shaik Daud Ismail J:

The plaintiff in her amended statement of claim averred that on 19 October 1970 at about 2.50 p.m. while she was a passenger in car no. C. 6596 owned by 1st defendant and driven by 2nd defendant at the 7th milestone Sg. Lembing/Kuantan Road which car went across and off the road and overturned thereby causing her serious injuries. Plaintiff claimed that the 2nd defendant as a servant or agent of the 1st defendant was negligent in that he was

driving at an excessive speed, failing to apply his brakes in time, driving on the wrong side of the road, allowing the car to get out of control and failing to exercise reasonable care and skill. She claims special damages in the sum of RM33,735, general damages and costs. In her statement of claim plaintiff itemised the particulars of special damages claimed.

The defendants in their statement of defence in so far as admitting that the accident took place denied the rest of the statement of claim and put plaintiff to strict proof thereof.

In her evidence plaintiff stated that she is 57 years old, and at the time of the accident that made her 44 years old, living in Kuala Lumpur. Although it is not very clear from either her statement of claim or in her evidence, it would appear that on the day in question she came from Kuala Lumpur to attend a marriage of her niece in Kuantan. On the day of the accident she was travelling in the said car as a guest of the bride, which formed part of a wedding convoy going from Sg. Lembing to Kuantan. It would also appear that this car which belonged to the 1st defendant was provided by the bridegroom to transport the guests of the bride to Kuantan from Sg. Lembing. According to the plaintiff, as there was a space in the said car she got in. Apart from saying that she was seated at the back seat and that an accident occurred at the 7th milestone Sg. Lembing/Kuantan road in which the car went over to the right and overturned, she could not describe how the accident occurred. She also said that at the time of the accident it was not raining but the road was wet having rained earlier. One thing she remembered clearly was that the car was going very fast because she felt giddy and told the driver, the 2nd defendant, not to drive fast but her plea appeared to have gone unheeded. After the accident she said she did not know anything, apparently she was unconscious, and only regained in the hospital. Before the accident she said she was a tobacco planter in Grik Perak and was earning RM4,000 to RM5,000 a year. She has 5 children and 3 of the children were assisting her. As a result of the accident she is now paralysed.

Plaintiff called a fellow passenger in the car, Chow Sow Yong (PW2). She too could not tell the Court how the accident occurred apart from saying that she too was travelling in the car as a guest of the bride and she too was seated at the back seat. She said that at the 7th milestone the car went to the left when it started bumping and after that she lost consciousness. She, however, confirmed that the car was travelling very fast and that she heard plaintiff complaining to the driver about it.

The 1st defendant in his evidence stated that he was the owner of the car C 6596 and that on 19 October 1970 he had lent the car to the bridegroom to be used as he liked for the wedding. The bridegroom is the brother-in-law of 1st defendant's younger brother. 1st defendant said that 2nd defendant was neither his servant nor his employee and that on the day in question 2nd defendant was not driving for him but for the bridegroom, and that he, the 1st defendant, had nothing to do with the 2nd defendant driving the car that day. The 1st defendant said that although the 2nd defendant came to his house that day to take the car, he, 1st defendant did not lend the car to the 2nd defendant but did so to the bridegroom.

The 2nd defendant in his evidence confirmed that he was driving the car in question when the accident occurred and also confirmed that he did so at the request of the bridegroom. He also confirmed that the 1st defendant did not request him to drive the car and that he was neither a servant nor an employee of the 1st defendant. In describing how the accident occurred he said that he was driving the car from Sg. Lembing to Kuantan transporting guests of the bride. He was driving at about 40 to 50 m.p.h. and at that time the rain had stopped but the road was wet. He said that as he came to a bend he slowed down but as he was taking the bend the car went to the left edge of the road and caused some noise made by

the wheels going over earth. At this time he said that the passengers in the back seat became frightened and one of them held his right shoulder and shouted. At that time he tried to turn the steering wheel to the right and the car then went to the right but at that time he lost control and the car finally landed in the ditch. According to 2nd defendant it was the plaintiff who held his shoulder earlier and he also saw her trying to open the door of the car. After the accident he said that plaintiff was not in the car but outside in some bushes 5 to 6 feet away from the car, and the door where she was seated was opened.

After hearing all the evidence adduced I was still vague as to how exactly the accident occurred but looking at the sketch plan it would appear that the car in taking the bend went to the left edge of the road and then veered across the road to the right and finally landed on its side in some swamps. The tyre marks created by the car veering to the left was about 154 feet in length and this clearly indicates that the car was speeding at an excessive speed. This confirmed what the plaintiff and PW2 said about the car going very fast. What made the car go in the manner and direction it did is not too clear but from the sketchy evidence supplied by the witnesses and the sketch plan I am of the view that the 2nd defendant in taking the bend must have been driving the car at such an excessive speed that he must have lost control of the car. The road being wet, as he himself confirmed, he should have exercised greater caution. Even plaintiff herself said, as confirmed by the fellow passenger PW2, that 2nd defendant was driving very fast so much so that the plaintiff felt giddy and she complained to him. Furthermore, in his report 2nd defendant said he was driving at 50 m.p.h. and nowhere did he add that he reduced speed on entering the bend as he now claims in his evidence. 2nd defendant in his evidence in cross-examination said that the accident would not have happened if plaintiff did not catch hold of his right shoulder. This I find hard to believe as in the first place this was never put to the plaintiff when she was being cross-examined and in the second place this was also not mentioned in his police report. I am of the view that there was no truth in this and it was just an afterthought on the part of 2nd defendant to bolster up his defence. 2nd defendant also stated that as the car went off the road he saw plaintiff opening the door presumably in order to jump out. This too I find hard to believe as in her evidence she said she seldom rides in cars and did not know how to open the door of this particular car. Looking at her give evidence and in the circumstances I am satisfied that she is not the type of person who would do such a thing.

For the above reasons I am satisfied that the accident occurred as the result of the negligent driving of 2nd defendant. As for the 1st defendant while it is true that he was the owner of the car in question, there is not one iota of evidence to show that 2nd defendant was driving the car for him or on his direction. On the contrary evidence showed that he lent the car to the bridegroom to be used for the wedding in any way the bridegroom deems fit and it was the bridegroom who requested 2nd defendant to drive the car that day. This is fortified by even the evidence of plaintiff and her fellow passenger who confirmed that the car was supplied by the bridegroom to transport the bride's guests at the wedding. As 2nd defendant was neither a servant nor employee of the 1st defendant and in the circumstances no liability can be attached to the defendant. In the event, I am satisfied that plaintiff has not proved by any evidence that 1st defendant is any way liable and the claim against 1st defendant is hereby dismissed.

As for quantum, sad to say, the plaintiff although represented by Counsel did not lead any evidence as to each and every item in the particulars of special damages. Since these have been denied by the defendants in their statement of defence, I would have expected plaintiff to adduce evidence on each item mentioned in the particulars of special damages. The same

would also apply for loss of earnings. Apart from plaintiff herself saying that she was a tobacco planter earning between RM4,000 to RM5,000 per year there is not one lota of evidence in support of this. There is no doubt that as a result of the accident plaintiff is now paralysed. In asking for general damages of RM80,000 learned Counsel for the plaintiff quoted the case of *Raja Mokhtar b. Raja Yaacob v. Public Trustee Malaysia* [1970] 2 MLJ 151. I am of the view that this is hardly the case to be used as a comparison with the present case. In that case the earnings of the plaintiff were well defined and could be computed whereas in the present case there is nothing for the Court to compute except the oral evidence of plaintiff unsupported as they were by any other evidence. As such, I feel that the only way to arrive at a just figure would be to award a lump sum for incapacity and in the circumstances I would consider a lump sum of RM65,000 would be fair and reasonable. As I said earlier since none of the items in the special damages have been proved I feel that the amount claimed for could not be considered at all. In her statement of claim plaintiff also claimed interest at 6% from the date of filing to the date of judgment. This action was filed by the plaintiff on 20 July 1976 giving the plaintiff's name as Kam Kwai Feng and later on discovery that this was not the plaintiff's name the writ was amended and the amended writ was filed on 26 January 1981. I am of the view that this was not the fault of the defendant and as such interest should run from the date of amended writ being filed. Accordingly, I entered judgment for the plaintiff against the 2nd defendant in the sum of RM65,000 with interest at 6% from the date of the filing of the amended writ to the date of judgment and costs.

Also found at [1984] 1 CLJ 171